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Supreme Court of the United States

OCTOBER TERM, 1944

No. 63

THE NORTHWESTERN BANDS OF SHOSHONE INDIANS,

Petitioners,

v.

THE UNITED STATES

PETITION FOR REHEARING AND BRIEFS IN SUPPORT THEREOF

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PETITION FOR REHEARING

Petitioners respectfully ask a rehearing of the above cause, in which the opinions were delivered March 12, 1945. In support of this petition, there is annexed hereto a memorandum prepared by Judge Manley O. Hudson, followed by the brief of other counsel for petitioners.

MEMORANDUM BY MANLEY O. HUDSON

A rehearing is sought in this case on the ground that the Court has misconstrued and misapplied the Box Elder Treaty of July 30, 1863.

The importance of the case is enhanced by the fact that taken together the Court's opinion and the concurring opinion place in jeopardy a great body of American law by which thousands of men and women of original American stock shape the day-to-day ordering of their lives. Doubt has been created, not solely with reference to the integrity

of the Box Elder Treaty, but also with reference to the general policy of the United States with respect to Indian treaties.

The issue in the case has a significance which transcends the actual controversy between the Northwestern Bands of Shoshone Indians and the Government of the United States of America. Far more is involved than the question whether a sum of money is to be set aside in the Treasury of the United States to be used, as the judgment of Congress may dictate, "for the health, education, and industrial advancement" of these needy bands of Shoshone Indians.

What is at stake here is the declared and historic policy of the United States in the treatment of a racial and linguistic minority. And this at a time when the whole world is aflame on the subject of the treatment of minorities.

Simple enough it seems to many Americans to prescribe justice for minorities in distant lands. Time and again our Government has sought by treaty and by diplomatic intervention to assure the protection of minorities in other countries. At this very moment, the United States is engaged in negotiations for creating a world organization designed to "promote respect for human rights and fundamental freedoms".

The Shoshone Indians belong to a minority which lives within our own borders. A denial of their legal rights, or a doubt cast on their statutory privilege of having such rights adjudicated, would tend to undermine our basic international policy before the conscience of the world.

Object of the Suit

The petitioners have not come to this Court to seek the performance by the Government of the United States of what the concurring opinion characterizes as a "moral obligation" ensuing from an ancient wrong. They are not here asking the Government of the United States to do

"what in the conditions of this twentieth century is the decent thing" (P. 15 of opinion) [1] They are not here appealing to the United States for what the Court's opinion refers to as "generosity" (P. 14). If the situation of the petitioners has such aspects, they are entirely outside the scope of this litigation.

The petitioners are before this Court asking solely for the recognition of their legal rights under a treaty solemnly concluded on both sides, which has been incorporated into the law of the United States.

The petitioners have come to the only tribunal which is open to them for asserting these rights. It is a tribunal of the other party to the Treaty, but the petitioners have no other choice. No international tribunal exists to which they may have access.

If, as intimated in the concurring opinion, it is "far-fetched" to "apply the litigation process" (P. 16) for the ascertainment of the petitioners' legal rights, the law of the United States prescribes it, and the petitioners have no recourse other than this litigation process.

It is true that the legal rights which the petitioners seek to have established grow out of a treaty concluded more than eighty years ago.[2] That treaty created a legal situation which the petitioners have inherited. Their succession to the legal rights growing out of that legal situation has not been challenged in these proceedings. Its confirmation by Congress in the Jurisdictional Act of February 28, 1929, 45 Stat. 1407, precludes any such challenge. That Act expressly negatives any "policy to leave in repose" the

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[1] Hereafter references to pages of the opinion of this Court will be merely "P. 1" etc. References to the record will be "R".

[2] In the *Cayuga Indians Case*, an award was given by an American-British Claims Tribunal in 1926 on a claim based on treaties of 1789, 1790 and 1795. Nielsen's Report, p. 307.

situation upon which the petitioners ask the Court to adjudicate.

The Box Elder Treaty has not been abrogated. No specious doctrine of *rebus sic stantibus* can rob it of force and effect. It has not been in any material sense modified. Its validity is expressly reaffirmed by the Jurisdictional Act. It continues to be the source of the petitioners' rights.

The deprivations suffered by the petitioners began, but they were not ended, eighty years ago. And the petitioners are prepared to prove, at a proper and later stage of this proceeding, that the legal situation which the Treaty created has been invaded by the United States in quite recent years.

Nor does any statute of limitations bar the petitioners' assertion of rights under the Treaty. Congress itself has determined, by the Act of February 28, 1929, that no "handicap of time" needs to "be overcome" in this case (P. 16). Until that act was passed, the petitioners had no recourse to the courts.

The Case Is Not Moot

Despite the intimation in the concurring opinion, this case is in no sense moot. It is true that the proceeds of a judgment would not be paid over to the petitioners directly, that they would be deposited in the Treasury of the United States "to the credit of" the petitioners, and that in the Treasury they would be "earmarked" for such appropriation as Congress may make "for the health, education and industrial advancement" of petitioners. With such a deposit, however, a decided advantage would accrue to these petitioners. With funds "earmarked" for their benefit, petitioners would be in a vastly better position than that in which they would be if the Government's own funds had to be provided to meet any appropriations by Congress.

A destitute, poverty-stricken, homeless people petitioners may be. Yet their misfortunes have not broken them com-

pletely. One possession has been left to them. Pride still stirs in their stalwart hearts. They do not wish to live on a dole. If the Box Elder Treaty is properly construed and applied, they will not be under that necessity.

Indian Policy of the United States

The historic policy of the United States in its relations with the earliest Americans may or may not have been the best policy for it to adopt. That is not an issue in this case. The national policy is clear. It has been constant for more than one hundred and fifty years.

Prior to the Act of March 3, 1871, 16 Stat. 566, hundreds of treaties were concluded with the Indians. They pledged the good faith of the United States. The Indians acted in reliance on them. The policy declared in the Act of 1871 to discontinue the exercise of the formal treaty forever in making agreements with Indians, did not affect treaties previously concluded, and many such treaties are in force today as the prized inheritance of thousands of men and women.

In some cases—of which this is one—the courts of the United States have been opened to Indians for the adjudication of claims based on such treaties. The intimation in the concurring opinion that our courts should be closed for this purpose is enough to strike consternation in the hearts of many Indian peoples. Whether it was or was not wise "to leave such an Indian grievance as this to settlement by a lawsuit" (P. 14), the policy of the United States has been long-continuing, and it is expressly declared and established in the Jurisdictional Act of February 28, 1929, 45 Stat. 1407, under which this case is brought. If this is not an adequate manner of dealing with "a sociological problem" (p. 15), that is not an issue in this case.

Legal Nature of Indian Treaties

Every treaty is an instrument of public law. An international treaty is an instrument of public international law. Yet public international law has not been strictly confined to the relations of political entities ranking as States, and agreements made by States with primitive peoples have not infrequently been brought within its orbit. In some cases, international tribunals have construed and applied treaties to which African or Asiatic peoples have been parties.[3]

At an earlier time, our treaties with American Indians partook of the nature of international treaties, and there was a disposition to apply to them public international law. Now for many years, however, they have been looked upon as instruments of *national* public law, a foundation for which is supplied by the exercise of powers conferred by the Constitution; and when the rules of *international* public law are applied, they are applied only by analogy.

As an instrument of public law, of course an Indian treaty is not to be read as a "common-law contract". Nor is it to be deemed, where a transfer of territory is provided for, the equivalent of a "conveyancing" instrument of private law. The technical refinements of the law of contract or the law of real property will find no place, and they are not to be sought, in an instrument of public law. More particularly is this true where one of the parties to the instrument is an Indian tribe.

As it regulates relations between peoples and not between individuals, every treaty may be said to be what the concurring opinion calls "a political document". That description sets no hurdles for the interpreter; but it should impel

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[3] For example, the *Island of Palmas Case* between the United States and the Netherlands, decided by a tribunal of the Permanent Court of Arbitration in 1928. Scott, Hague Court Reports (2d ser.), p. 84.

in him a respect for the distinction between a treaty and a contract, even between treaties and "contracts between white men".

In international public law, a sharp distinction has been drawn since the days of Victoria between a treaty concluded by two States and a treaty made by a State with an untutored people. A similar distinction has been drawn in our national public law.

A treaty between the United States and Indians is not a treaty between equals. One of the parties is the self-appointed guardian of the other. On the one side, the negotiators can write and read their own language; they are familiar with the art of expression; the treaty is drafted by them; and the text is in their language. On the other side, the negotiators do not write and read their own language; they are not skilled in expression; their role is usually limited to accepting or rejecting what is said to them by interpreters who are not of their own selection. Moreover, for the Indians, there may be, in the background of the negotiations, a compulsion which is not born of their own needs.

Yet the Indians did not lack capacity to enter into a treaty. They were capable of understanding the transaction which we call a "bargain". They were accustomed to barter. They had a sense of exchange. They traded with other Indians as well as with white men. They entered into treaties with other Indians, as well as with white men.

Even if it be true, as the concurring opinion states, that the Indians "did not know what titles were" and that they "had no such concept as that of individual land title", their sense of tribal property was well-developed. Studies of the law of the earlier Americans have been all too few, though the law of primitive peoples in some other parts of

the world has been thoroughly explored,[4] and the aid which more adequate investigation might have revealed is lacking. Even if Indian "acquisitiveness" had not developed "a law of real property" comparable to that of the white man, Indians had a sense of what was theirs, and of what was another's, to use and enjoy. A blanket possessed, a territory over which they were habitually free to move and hunt and fish, was theirs and not another's. Habit and custom moulded their wants, and their wants were not those of the squatter. They changed their habitat with the season. They lived and moved as a community. Long before Karl Marx, they had a communistic society. Like New England, they had a conception of the "common"; unlike New England, they built no stockades to serve as their prisons. They declined to be "fenced in", even in their own "country".

These characteristics did not preclude the Indians from claiming land as tribal property, nor prevent their seeking and bargaining for recognition of their claims in treaties with an encroaching outsider.

Interpretation of Indian Treaties

The inequality between the parties imposes a special duty on the interpreter of an Indian treaty. Even a treaty between States, dealing with each other at arm's length, is to be interpreted by a national court liberally. As stated in *Nielsen* v. *Johnson*, 279 U. S. 47, the rule is that "treaties are to be liberally construed", and "when a treaty provision fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred". When a court construes a treaty with an Indian people, the reasons for this rule become even more imperative. It is then necessary

[4] For example, Van Vollenhoven, Miskenningen Van Het Adatrecht, Vier Voordrachten Aande nederlandsch — in — Dische Bestugrsacademie (1926).

"to counterpoise the inequality 'by the superior justice which looks only to the substance of the rights without regard to technical rules.'" *U. S.* v. *Winans*, 198 U. S. 371, 380, 381.

The petitioners contend that, as stated by Mr. Justice M'Lean in *Worcester* v. *Georgia*, 6 Peters 515, 582, "the language used in treaties with the Indians should never be construed to their prejudice", in the sense of disappointing their justified expectations; of course a treaty of cession might "prejudice" Indians in the sense of extinguishing their titles. Petitioners also contend that terms employed in an Indian treaty should always be construed, as was said in *Jones* v. *Meehan*, 175 U. S. 1, 11, "in the sense in which they would naturally be understood by the Indians". It is a consequence that when called upon to interpret an Indian treaty a court must have scrupulous regard for what the Indians, with their mental habits and their unlettered wisdom, would have been justified in taking as the meaning of terms translated to them; that it should refrain from attributing to Indians the refinements of the English language which, though easy for lawyers to appreciate after the event, may or may not have been in the minds even of the white negotiators who framed the language.

No exception is taken to the rule announced by the Court that effect should be given to "what the parties meant by the treaty". Exception is taken, however, to the way in which the Court applied that rule in this case. For the Court has based its conclusion on what may have been the objective of only one of the parties. Yet the rule announced calls for determining what both of the parties meant by the treaty.

The rule requires a careful application. What the parties meant is not to be ascertained by an attempt to discover the mental cogitations which actually took place. It cannot be divined by a psychiatric reconstruction based upon

a series of "fictional assumptions". A *subjective* intention cannot be deciphered. It is an *objective* intention which is to be sought, and the text may require that with the aid of the materials available it should be ascribed to the parties.

Negotiators are not always clear in their ideas. They cannot foresee, and they usually do not atempt to foresee, all possible applications of the text to which they subscribed. The issues which more often arise are those which were never contemplated by the draftsmen of the treaty. To avert a breakdown of the negotiations, a draftsman will often search not for clarity but for a studied lack of clarity, indulging a hope that an assignment of objective meaning by a competent body will enable his ends to be accomplished.

Interpretation is not a process of phonographic reproduction. It requires the judgment and skill of judicial experience. Words do not possess absolute meanings to be transcribed. It is their use at a given time and place, by all the parties, which is to be judged.

Hence the function of a tribunal is not limited to searching for entertained intentions. It must appreciate the situation in which both parties found themselves, it must weigh the evinced desires of both parties, it must determine the extent to which those desires were realized, it must assess the effects of the means adopted to that end, and in this light it must assign a meaning to the text. As one competent writer on international law has put it, the tribunal must seek and build out of the materials available for judicial use the "design" of the parties.[5]

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[5] Charles Cheney Hyde, in 24 American Journal of International Law (1930), p. 1; 27 *idem* (1933), p. 502.

The Text of the Box Elder Treaty

What is the text to be construed in this case? It consists of three parts, and they are of as many origins:

(1) The four "articles of agreement" signed and marked at Box Elder on July 30, 1863.

(2) The six "articles of agreement" signed and marked at Fort Bridger on July 2, 1863, later incorporated into the Box Elder Treaty "as a part" thereof, by Article II of the latter.

(3) An additional article, which is referred to in the Court's opinion as "the Senate's amendment to the treaty". As the text was proposed by the United States Senate, this reference serves for purposes of convenience. Yet of course the Senate's proposal of the text gave it no force or effect. Spurred by the Senate's proposal, the Government of the United States decided to seek the incorporation of the proposed text into the Treaty, and that result was achieved only when on November 18, 1864, both of the parties agreed to that effect (R. 57). As incorporated, the Senate text became an addition to the Treaty. It did not amend the pre-existing text.

These three parts of the Treaty constitute its text, and that text consists of eleven articles. Each part of the Treaty must be read with every other part. Each provision is to be given effect in the light of other provisions. The cardinal rule of interpretation must be applied that the Treaty is to be construed as a whole.

This treaty was one of a series of the five treaties negotiated with Shoshone Indians between July 2 and October 14, 1863. As the United States commissioners acted under the same instructions, as the texts of the five treaties followed the same general pattern, and as the Fort Bridger Treaty

was textually incorporated in the Box Elder Treaty, it may not be improper to interpret each of the five instruments in the light of each of the others. As a part of the history of these treaties, account may also be taken of the fact that the Shoshones were represented at the negotiations which led to the conclusion of the Fort Laramie Treaty of September 17, 1851, and were willing to set their marks to that instrument which has consistently been held to recognize Indian title[6]; their failure to be included among the parties was due only to the fact that they belonged to a superintendency other than that of the chief negotiator on behalf of the United States. Annual Report, Commissioner of Indian Affairs, 1851, pp. 182-184.

Scant materials are available to serve as aids in the interpretation of the Box Elder Treaty, and all of them originate with a single party. The use of such materials is in no sense improper, but they are not to be taken as controlling in the determination of "what the parties meant by the treaty". They could be given such effect only if, instead of a treaty, the Court were interpreting a legislative instrument.

First are the instructions to the Treaty Commissioners of the United States. Instructions to the Indian negotiators, if they existed, are not available. On the Government side, it was "not expected that the treaty will be negotiated with a view to the extinguishment of the Indian title to the lands" (R. 34). It was consistent with this instruction for the Commissioners to conclude a treaty acknowledging the title which they were not to extinguish, and as will be later shown this is what they did. The United States desired a treaty "mainly to secure the safety of travel" (R. 34)

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[6] *Fort Berthold Indians* v. *United States* (1930), 71 C. Cls. 308; *Assiniboine Indian Tribe* v. *United States* (1933), 77 C. Cls. 347, 370-1, appeal dismissed and cert. denied 292 U. S. 606; *Crow Nation* v. *United States* (1935), 81 C. Cls. 238.

along routes in Shoshone territory, and acknowledgment of the Indian title to their lands was a means of accomplishing that end.

Second are the reports made on one side only. On June 20, 1863, Treaty Commissioner Doty expressed the desire "that some arrangement may be made by which they [the Indians] can with satisfaction return to their hunting grounds, and upon terms which shall secure peace hereafter" (R. 39). Acknowledgment of Indian title was directed to this end. On August 30, 1863, within a month of the execution of the Box Elder Treaty, Commissioner Doty wrote to the Commissioner of Indian Affairs requesting a map upon which he might be "enabled to show the boundaries of the Country ceded by the Shoshones" (R. 51); in a letter of September 22, 1863, he explained "the first object" of the Box Elder Treaty, "to effect and secure a peace with Pokatello, as the road to Beaver Head gold mines, and those on Boise River, as well as the northern California and southern Oregon roads, pass through *his country*" (R. 52). The attainment of this object called for, and the treaty effected, a recognition of the Indian title.

In such correspondence, it would be quite understandable if to ingratiate themselves with their superiors the Treaty Commissioners yielded to a temptation to minimize the obligations imposed on the United States, and the value of the correspondence is to be appreciated with the discount which this possibility entails.

Analysis of the Box Elder Treaty

In concluding the Box Elder Treaty, the parties on both sides had a number of objectives. To say that they had a single objective would be to ignore various parts of the text.

The objectives of the parties are not to be confused, however, with what they did in pursuit of their objectives. Even if it may be inferred that the United States would clearly

have stated its objectives, it cannot be inferred that either party would have clearly spelled out the results achieved. Those results are the legal consequences of what was done.

The Treaty concluded effected various results. These may be enumerated without any undue emphasis on any particular objective of the parties.

1) It established (Art. I) friendly relations between the parties, and formalized the state of peace already existing. Despite such provocations as the attack by Colonel Connor at Bear River in January, 1863 (R. 35), and the subsequent outrage at Bannock City (R. 38), the Shoshones had not gone to war (R. 28). Only the later treaties were entitled "treaties of peace". The friendly relations established were not a one-way street. Peace was to be maintained by both sides. The Shoshones would have been justified in regarding the provision as a guarantee of their security. And security meant for them, as it does for the nations at war today, a continued freedom to live on their own lands in their own "country," undeprived as well as unmolested.

2) It provided (Fort Bridger, Art. II) safe passage for the Government of the United States and travelers under its protection on routes "now or hereafter used" "through the Shoshonee country." This in itself was a recognition by the United States of a "Shoshonee country," held by the Shoshones according to their ideas of what were their lands. The Shoshones would have been justified in so understanding the provision.

3) It imposed (Fort Bridger, Art. II) two duties on the Shoshones: a) to seize and deliver up their "bad men committing depredations"; b) to guarantee, i.e., to guard the safety of travelers. Neither of these duties could be performed unless the Shoshones could have land on which to live and operate. The imposition of these duties was therefore

tantamount to a recognition of their lands referred to as "the Shoshone country," and the Shoshones would have been justified in so understanding the provision.

4) It provided (Fort Bridger, Art. II) that the United States might established military agricultural settlements and military posts, ferries, and comfort settlements, "along said routes" through "the Shoshonee country." In granting this permission, the Shoshonees would have been justified in thinking that they were dealing with their own lands "in the Shoshonee country" and that the United States admitted the lands to be theirs to deal with.

5) It provided (Fort Bridger, Art. III) that the telegraph and stage lines established "through a part of the Shoshonee country" should be unmolested and protected. The Shoshones would have been justified in taking this to be a recognition of their "country," and their performance of the duty assumed necessitated their holding lands in that "country."

6) It declared (Fort Bridger, Art. III) that the Shoshones "stipulated" that a railway might be located and operated "through any portion of the country claimed by them." The Shoshones would have been justified in concluding that the United States recognized their claim to such territory.

7) It provided (Fort Bridger, Art. IV) that "it is understood"—this can only mean understood by both parties—"the boundaries of the Shoshonee country, as defined and described by said nation, is as follows." Article IV of the Box Elder provisions, which serves for a part of the Northwestern Shoshones the same purpose as Article IV of the Fort Bridger provisions for other Shoshones, is to be read with the same introduction; thus read, it provides that *it is understood* "the country claimed by Pokatello, for himself and his people, is bounded" as indicated. The office served

by these provisions is obvious on the face of the Treaty. They mark bounds for "the Shoshonee country" to which various provisions relate, and in which rights are granted by and duties are to be performed by the Shoshone Indians. The United States would have been justified in taking the definite boundaries to foreclose the possibility of more extensive claims; the Shoshones would have been justified in thinking that their claims to the territory described were admitted by the United States. If the negotiators on the Government side were disposed to bear down on the word "claimed" as substantially limitative, and to say that the formalization of the claim in the Treaty had no other effect than to impart to them desired information, it seems highly improbable that the negotiators on the Shoshone side could have shared that disposition, even if the translation to them bore such refined distinctions. They would have been justified, and the white men must have been cognizant of the fact, in taking the unopposed and unrefuted formalization of their claim to be a recognition of its validity. A "claim" by the Indians was to them an assumption and an assertion of title—for that matter, neither the United States nor Mexico had a different conception. An admission of their claim was an establishment vis-a-vis the admitting party of the only title which Indians ever knew. If the language of the Box Elder Treaty was less "apt" than that of Article 5 of the Fort Laramie Treaty of 1851, the difference was not discernible to an Indian mind; and even a white man would have difficulty in seeing a difference between land "claimed" by Indians and land "recognized and acknowledged" by various Indian tribes to be theirs respectively, insofar as acknowledgment by the United States is concerned.

8) It provided (Art. IV) that "in consideration of the other stipulations in the preceding articles," the United

States should increase the annuity to the Shoshone nation by five thousand dollars. In Fort Bridger, Article V, the annuities were said to be, in part, compensation for "the rights and privileges hereby conceded," among which were rights of user of lands in "the Shoshonee country."

9) It provided (additional article) that nothing in the Treaty should "be construed or taken to admit any other or greater title or interest *in the lands* embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof." Even if this does not indicate "more than an intention" of the Senate in proposing this addition "to be sure the new treaty did not add to the complexities of the Mexican Cession title situation" (P. 13), the addition, effected not by the Senate but by the Government of the United States and by the Shoshones, is a part of the Treaty to be construed by "what the parties meant." The Indians could have known nothing of such white men's complexities. It seems most improbable that they had ever taken much account of Mexico's cession to the United States. If the provision had any meaning for them, it would naturally have led them to think that the United States was admitting the title or interest which they had previously enjoyed in the lands embraced within the territories described. Even a white man would be likely to exercise his logic to conclude, from an assertion that "other or greater" interest was not admitted, that some interest was admitted. The terms in which this addition was explained to the Shoshones are not known. They would certainly have been justified in seeing in it a recognition by the United States of the title they had previously held, and the Government of the United States cannot be taken to have moved in ignorance of that fact. If the Shoshones had had the benefit of any legal

advice whatever, they would doubtless have been advised to that effect. They did not have legal advice, but they now seek that legal construction.

It seems not inapposite to recall that when the Covenant of the League of Nations was amended, on President Wilson's proposal, to provide (Article 21) that "Nothing in this Covenant should be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe Doctrine, for securing the maintenance of peace," this was generally interpreted as an admission by other States of the validity of the Monroe Doctrine. Yet the provision is even weaker than that in the additional article of this Treaty.

Taken as a whole, the Box Elder Treaty should therefore be adjudged to have vouchsafed to the Shoshones the enjoyment in their own way of "the Shoshonee country." Almost every one of the eleven articles in the Treaty must be given that effect. "The Shoshone country" was delimited not by metes and bounds but by the natural landmarks which the Shoshones knew and could understand. Within their "country," they had duties to perform, they granted rights which had not previously existed. Expressly, the Treaty denied to them greater rights and interests in the *lands* in their country within the territory formerly Mexican than they had enjoyed prior to the Mexican Cession by Mexican laws; expressly, *a contrario*, it assured to them the rights and interests, "*in the lands* embraced within" their described territories, which they had possessed prior to the Mexican Cession.

In view of its text, and of the justifiable understanding of that text by the Indians, it is a complete travesty for the Court of Claims to say (R. 58) that the Treaty was merely "a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end."

This Court's opinion neglects the fact that the Treaty was a bilateral instrument. It ignores what the Indians could have justifiably understood the text to mean. It fails to establish objectively the intention of the two parties.

That the Court has misapplied in this case its own rule of determining "what the parties meant" is evident from its "inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty-text, or by the reports of the treaty commissioners, to their superiors, or in the transmission of the treaties to the Senate for ratification" (P. 10). On the Indian side, no instructions, and no reports by the negotiators are available and probably none ever existed; the understanding of the Indians must be deduced from the treaty text, placed in its proper setting. Yet not a line in the majority opinion or in the concurring opinion reveals an attempt to appraise the Indians' objectives or their understanding, or what the United States commissioners must have known to be the view taken by the Indians.

The Court distinguished the provisions in the Box Elder Treaty from those in the Fort Laramie Treaty of September 17, 1851, which have repeatedly been held to have acknowledged Indian titles; yet Article 5 of the latter could have meant, neither to Indians nor to white men, anything different from what was contained in the Box Elder Treaty. Nor is the Fort Laramie Treaty to be distinguished as having set boundaries between various Indian tribes; for the series of five Shoshone Treaties also had that effect. In dealing with the additional article of the Box Elder Treaty, much is said of what might have been in the contemplation of the Senate which drafted it, but nothing is said of the

understanding of the Indians without whose acceptance the addition could not have been effected.

The Court's interpretation and application of the Box Elder Treaty would impose upon petitioners a white-man's interpretation of a white-man's language, without regard for the red-man's conception of the effect of the instrument.

Respectfully submitted,

MANLEY O. HUDSON.

BRIEF OF OTHER COUNSEL

I. *The Court Has Made Unwarranted Assumptions as to the Number of Present Indian Beneficiaries, the Time of the Taking of the Land by the United States, and the Amount of Money Involved.*

There is no evidence in the record as to the present number of the Northwestern Bands of the Shoshones. If there were ultimately a recovery in this case, the Secretary of the Interior would in the usual course compile a roll of the tribe. The Court (p. 16) repeats an estimate made in 1863 of 1500 members (R. 28), but it is obviously misleading to think today in those terms. The record presents no data as to the increase in the numbers of these admittedly peaceful bands.

The Court assumes that the entire area of 15,000,000 acres was taken by the United States around 1863. The Court of Claims made no finding as to the amount of land taken or the time of taking. Under its practice complete evidence on this point is not taken until the Court first determines that the United States is liable. Consequently only sufficient evidence was introduced below to show that some of petitioners' land had been taken. Petitioners admit that the land taken does not embrace the entire area set forth as petitioners' land in the Shoshone treaties, and that such as was taken by the United States has been gradually taken over the years—some of it only recently. There is, therefore, no basis for the assumption that this is an ancient wrong. A considerable amount of the land has been taken from the present generation.

~~In addition, the Court erroneously assumes (pp. 1, 16) that the United States must pay for the entire 15,000,000 acres pleaded.~~ The Court also assumes that the 15,000,000 acres must be paid for by the United States—if recovery is

allowed in this case—at a dollar an acre. But the Court of Claims made no finding as to value, since that was not yet in issue; and it should be noted that in the three cases involving the taking of Indian lands under the Fort Laramie treaty the Court of Claims found a value of only 50-cents an acre. *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 340; *Assiniboine Indians* v. *United States*, 77 C. Cls. 347, 376; *Blackfeet Indians* v. *United States*, 81 C. Cls. 101, 136. From the valuation in those cases, gratuities were offset so that in the first case the recovery was only $2,169,168.58, in the second nothing, and in the third $622,465.57. In the present case there has been filed in the Court of Claims a report of the General Accounting Office, claiming offsets of over $4,000,000 from 1863 to 1931, against petitioners (including, however, certain items for other Shoshones as well). It is therefore improper to assume that a judgment for petitioners would entail an enormous money judgment against the United States.

II. *The Concurring Opinion Raises Questions upon Which Petitioners Have Not Been Heard and Repudiates a Century of Legislative, Administrative, and Judicial Practice.*

To say that a favorable judgment would give the Indians "neither their lands nor money", put not a cent "into the reach of the Indians", and amount only to an "earmarking of funds" (pp. 14, 15) misconceives the guardianship exercised by the executive upon authority conferred by Congress. The Indians, while they may not get the identical lands sued for, certainly do receive the money just as any other ward or beneficiary might receive it. The sovereign, as guardian may utilize it to purchase lands, ventures into farming or husbandry, for undertaking crafts, for training, or for other useful purposes. See for example 50 Stat. 872 and 53 Stat. 1252 which followed the judgment of this Court

in *United States* v. *Klamath & Madoc Tribes*, 304 U. S. 119.

Nor is such a judgment merely an "earmarking of funds", but a source of funds without which no moneys would be available to them for such purposes. Payments of judgments in favor of Indians, satisfied by Congressional appropriations, are required by law to be made under the direction of the officers of the Interior Department charged with the supervision of Indian Affairs (25 U. S. C. § 118); and the same officers are similarly authorized to allot to certain Indians their share of tribal funds or pay such share for their benefit (*id.*, 121). The position taken in the concurring opinion comes close to a statement that a beneficiary has no property rights because his trustee will hold the recovery.

Moreover, the purpose of the Jurisdictional Act—in providing that the funds realized should be used "only for the health, education, and industrial advancement of said Indians"—is obviously designed to preclude their use for mere subsistence purposes under the guardianship system. Thus, the Indians not only receive the beneficial interest in any recovery but are assured that the moneys realized will not be used for mere day-to-day purposes, but will enable them to live a more abundant life—something they could not possibly enjoy under subsistence funds doled out by Congress.

To say that Congress could appropriate funds for "the health, education and industrial advancement" of the Indians "without any judgment or earmarking of funds", and to assume that Congress will do so with the same liberality as in the case of funds owned by the Indians, is an altogether unrealistic approach and ignores legislative policy determined by the proper arm of the Government based upon political considerations not presented to the Court. Funds owing Indians by reason of breach of a solemn duty of the United States may be realized for In-

dians through payment of a Court judgment when the practicalities of politics forbid their being made available by direct appropriation from the Treasury. Indian bills are almost invariably considered in Congress only on the consent calendar. We are informed by the Clerk of the Committee on Indian Affairs of the House of Representatives that of 190 such bills in the last Congress, only 18 passed.

Moreover, the Constitution commits to Congress the judgment as to how obligations, moral or legal, are to be met; and it has embodied its judgment in the Jurisdictional Act under which this proceeding is brought. Finally and more important, the Indians desire no legislative handout; for they desire—just as white litigants desire and secure—an orderly, ethical, and judicial determination and righting of wrongs. The Constitution and Congress provide courts for that purpose.

To say that "the generation who suffered" has gone (p. 15) is a half truth. Their descendants, who have not been the beneficiaries of suitable treaty provisions, feel that they still suffer. In them the tribal idea and tribal continuity is strong. As simple people, they have heard endlessly of the wrongs committed by the whites upon their tribe. They sue as a political entity which has never ceased to exist—the tribe. As a tribe, they wish the matter determined. The Court of Claims has been denied to the tribe until now. They do not feel that these are "endless and pointless lawsuits" (p. 18), but that they are the presentation of claims just as justiciable as a thousand other kinds of public and private—domestic and international—claims and causes. Neither are they pointless lawsuits to the executive officers or legislative committees charged with the conduct of Indian Affairs.

It is an indulgence in "unrealistic and fictional assumptions" to say that the problem here is not one of legal obligation, legal right, and legal damages (p. 15). For no other

solution will set at rest the tribal yearning for vindication. There is no more difficulty in determining the obvious effect of this Treaty than there is of a holographic will, a frontier sale of a mining claim, a person's domicile, a constitution, or a treaty with a foreign power executed in 1863. The only difficulty here is the importation of the conveyancer's art into an otherwise simple agreement with an unlettered people. The treaties now about to be entered into with a large part of the world include comparatively primitive people, yet one of the most persistent demands is that means be provided for the judicial determination of matters arising in the future under them. Contrary to the assumption of the concuring justices, Indian treaties are not the invention of the white man, but extend to the pre-Columbian era when tribe treated with tribe as to peace, territory, and rights of passage.

Nor is there any difficulty in determining damages. Certainly it is easier to attach a value to the land of which petitioners were dispossessed than to translate into money the value of a breach of promise, seduction, wrongful death (made actionable in behalf of the personal representative of decedent's estate by Lord Campbell statutes) or the thousands of other things which courts, without complaining, do daily.

This Court, in the absence of a hearing on this issue, has no justification for assuming that the Shoshones had no "property concept". The fact of the matter is that Indian tribes had a "property concept" long predating the arrival of the white man. It was predicated, as is this suit, on tribal ownership. While the individual Indian did not have our precise concept of individual property he did

> "know what title to his tribe means. He has been accustomed to hear the claim made that his tribe owns a section of the country. The invasion by one tribe of the region claimed by another has been the cause of

innumerable wars. The denial of ownership in his tribe he fully understands, and whether that denial comes from a hostile tribe or from one of his own number, it is, in his opinion, a crime to be punished."[1]

The recent research of anthropologists is practically all to the effect that the North American Indian had a very definite property concept.[2]

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[1] *The Public Domain* (G. P. O., 1884), p. 1254, quoting *Annual Report*, Secretary of Interior, 1883.

[2] Melville J. Herskovits, THE ECONOMIC LIFE OF PRIMITIVE PEOPLES (1940); C. XI, The Nature of Primitive Property, pp 271-290; C. XII, Land Tenure; Hunters and Herders, pp. 291-307; C. XIII, Land Tenure; Agricultural Peoples, pp. 308-329. At p. 291, Herskovits states:

> The extent to which non-agricultural and non-herding folk possess property in land has in recent years received more careful study than almost any other phase of primitive land tenure. This is directly attributable to the challenge presented by one of the most widely accepted tenets of the older evolutionary school of social theories, that in earliest times hunters and foodgathers recognized no ownership of the land from which they drew their sustenance, and that not until agriculture developed was the allotment of land regularized in customary law. That agricultural peoples hold in common large portions of their available lands—even land that is worked—was generally overlooked. The growing body of testimony from hunting and herding tribes which contravened the accepted point of view went unnoticed for a considerable period, until cases presumed to be aberrant were given new significance by the results of research carried on among the hunting tribes of northwestern North America. It then became apparent that the earlier hypothesis, if not entirely untenable, needed at least to be revised; and support among anthropologists for the older position has been almost entirely abandoned."

See also PRIMITIVE SOCIETY, Robert H. Lowie (1920), pp. 205 *et seq.*, pp. 210 *et seq.* At p. 205, Lowie states, "Notions of property tinge every phase of social life". See particularly Ralph Linton in La Farge, "The Changing Indian" (1942), pp. 42-54. See generally for rights in real property of the primitive Americans, ANTHROPOLOGICAL RECORDS (Univ. of Cal. Press) as follows: Drucker XVII; Gifford, XII; Stewart XVIII; also, W. W. Hill, notes on Pima Land Law and Tenure, AMER. ANTHROPOLOGIST (1936), vol. 38, pp. 586-589; John M. Cooper, Land Tenure Among the Indians of Eastern and Northern North America, PENNSYLVANIA ARCHAEOLOGIST (July, 1938), vol. 8, p. 55; Schmidt, DAS EIGENTUM IN DEN URKULTUREN (Munster in Westfalen, 1937).

Indeed modern anthropological research has established that the Shoshones themselves, in common with other tribes, had a very definite concept of tribal land.[3] If granted a rehearing we can establish this from public documents. In the view of this intelligence, of which the court lacked knowledge, we submit that it is not the Shoshones but this Court and the court below which now attempt to force the problem into "terms of common-law contract and conveyancing" (p. 17).

Consequently before this Court casts doubt upon the whole process of adjudicating Indian claims, and assumes that Indians had no property concept, it should permit the problem to be thoroughly briefed and argued on reheaing—particularly since the issues raised by the concurring judges were not raised by respondent and therefore not briefed by petitioners. This is the least that can be done by this court for these native Americans.

III. *The Majority Opinion (even the Footnotes) Ignores the More Critical Portions of the Treaty as Expressly Adopted by Reference; and the Decision Is Contrary to the History (Including Newly-discovered Public Documents), Terms, and Tenor of the Treaty.*

The Court assumes that, by the Treaty, "the Indians agreed not to molest travelers, stagecoaches, telegraph lines or projected railroads" (p. 5) and nothing more. Although the Court states that the decisive question is whether it was intended "to recognize or acknowledge by implication the Indian title to the lands" (p. 4), the crucial acknowledgment in Article V of the Ft. Bridger Treaty (R. 41) which was incorporated by reference in the Box Elder Treaty (Art. II, R. 43) is not even set out in the footnotes. Even

[3] Tribal Distribution in Eastern Oregon and Adjacent Regions, Verne F. Ray and Others (July-Sept. 1938), Vol. 40, American Anthropologist.

more important, the "understanding" expressed by the United States in the Ft. Bridger Treaty as to boundaries (Art. IV, R. 41) is not even discussed.

The full Treaty—that is, the Box Elder Treaty plus the incorporated Ft. Bridger Treaty—is shown by the following tabulation of covenants:

1. Reestablish "Friendly and amicable relations" and "a firm and perpetual peace" (Art. I, R. 43; Art. I, R. 40).

2. "Routes of travel through the Shoshonee country" to be "forever free and safe * * * without molestation or injury" by Shoshones; safety of travelers guaranteed; predatory Indians to be seized and delivered to U. S. officers; "military agricultural settlements and military posts may be established * * * along said routes; ferries may be maintained * * * and houses erected and settlements formed * * * as * * * necessary for the comfort and convenience of travelers" (Art. II, R. 40). Same as to telegraph, stages, and a railway (Art. III, R. 40-41).

3. "It is understood the boundaries of the Shoshonee country, as defined and described by said nation, is, as set forth (Art. IV, R. 41; Art. IV, R. 44).

4. The United States is "aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by the whites, and by the formation of agricultural and mining settlements" and the United States "are willing to fairly compensate them [the Indians] for the same" (Art. V, R. 41).

5. Shoshones acknowledge that the receipt of annuities is full compensation for the loss of game "and the rights and privileges hereby conceded" (Arts. V and VI, R. 41, 42; Art. III, R. 43-44).

6. The United States recognized no "other or greater interest in the lands * * * in said tribes" than Mexican law recognized in territories ceded by Mexico.

This is the full Treaty agreed to at Box Elder, as distinguished from the brief instrument of adoption set forth

at pages 6-7 of the opinion. The acknowledgment of petitioners, which the Court overlooks, that they were receiving the annuities not, as the Court assumes, as the price of peace, but as consideration for (1) the loss of game, (2) the "rights and privileges * * * conceded," meaning the rights of transit etc. above set forth, must have conveyed to the Indians the impression that their title was being recognized. Even in a white man's civilization one does not receive money for rights of transit over land unless his title is thereby recognized.

The Court, however, lays stress upon the fact that a purpose to recognize Indian title was not "clearly and definitely expressed by instruction" to the treaty commissioners (p. 10) and distinguishes the instructions given with reference to the Ft. Laramie Treaty (p. 11) on the ground that the treaty commissioners there were told "to establish for each tribe some fixed boundaries." That Treaty involved the tribes just east of the Shoshones. The Shoshones pursuant to a conference held the year previous between the Commissioner of Indian Affairs and Indian Agent Holeman were represented by 60 of their head-men, because

> "It was greatly desired to have them there, as the main route for emigration passed through their country."

They were not, however, included in the Treaty as finally drawn *only* because the superintendent in charge of the negotiations believed "that they are not properly in his superintendency, but that they belong to the superintendency of Utah" (Annual Report, Commissioner of Indian Affairs, 1851, pp. 182-184; Appendix to Pet. Br., pp. 9-10).

Since this case was decided, there has come to light another treaty negotiated with the Shoshones in 1855 by the Indian Agent for Utah (Bancroft, *History of Utah*, 1890, p. 477). By this negotiated treaty the Shoshones guaran-

teed the people of the United States safety in traveling "through our country," gave "the right of way through our country" to "pass and repass," acknowledged the applicability of the laws of the United States with reference to "crimes within the limits of our country," and agreed to surrender any "who may have committed crimes within the limits of our country." The negotiated treaty was not ratified, presumably because the agent had not been authorized to negotiate it.

It is thus clear that the Northwestern Shoshones, having taken part in the Ft. Laramie negotiations designed to establish "fixed boundaries" and lay off "geographical * * * domains", and having negotiated the unratified treaty of 1855 replete with statements respecting "their country", must have had the same purpose in view at the following Box Elder negotiations. Neither whites nor Indians are likely to perceive a distinction warranting the contrary result in the two cases. Geographical domains were laid off in the Shoshone treaties between the five divisions of the Shoshone Nation in the same way as between the different tribal signatories in the Fort Laramie treaty.

The maintenance of "friendly and amicable relations" could be achieved only by making such territorial arrangements. The commissioners were instructed not to extinguish Indian title (pp. 5, 9), which means what it says—that the Shoshones were to retain title. Their boundaries were to be established "within which they will confine themselves" (R. 34). Without the niceties of conveyancing, that expressed the gist of Indian land policy as vigorously initiated by Andrew Jackson long before:

> "Circumscribe their bounds * * * place [their] landmarks at a permanent point * * *. You give content at home, and peace on your frontier * * * The peace and happiness of the Indians require that this should be done * * * (Letter to President

Monroe, 1817, *Correspondence of Andrew Jackson*, II, pp. 280-281.)"

That was the mainfest purpose of the Shoshone treaties. The immense region over which the Shoshones wandered, from Oregon to the Dakota territory, was reduced to a defined and confined area.[4] Only a month after the negotiation of the Box Elder Treaty, Commissioner Doty requested maps upon which he might "be enabled to show the boundaries of the Country ceded by the Shoshones" (R. 51). The very fact that lands outside the boundaries indicated by Doty were "ceded" to the United States is a recognition of title for without such the Indians had nothing to cede.

That the territory reserved to the Indians may appear large by present standards is not significant, because it is located in what was then known as the Great American Desert and the Shoshone lands had been reported to the Commissioner of Indian Affairs as "too high in elevation ever to be useful for cultivation of any sort" (Annual Report, Commissioner of Indian Affairs, 1849, pp. 66-68; Appendix to Pet. Br. p. 6). "Free and safe" passage was what the United States wanted and got (Arts. II and III, R. 40-41).

In return for what it got, the United States both recognized that it must pay compensation and that the Shoshones had certain territory. The territory was defined not by one treaty but by the five Shoshone treaties (Pet. Br. pp. 12-13). The Box Elder Treaty, here involved,

[4] The majority opinion here recognizes that the definition of boundaries is something more than mere statement of claim, by stating

"It is quite understandable from the point of view of both petitioners and Congress that the Government should limit its submission to suits to claims under the boundaries if acknowledged by the treaty rather than to consent to judicial examination of claims for taking the unknown area of their possible Indian title." (p. 3).)

supplied only two of the interior lines (Art. IV, R. 44) subdividing the total Shoshone area defined by the other treaties (see map R. 55). The exterior lines were supplied by the Ft. Bridger (Art. IV, R. 41), Ruby Valley (Art. V, R. 46), and Tuilla Valley (Art. V, R. 48) treaties. Each of these, including the Ft. Bridger Treaty which the Box Elder Treaty incorporated by reference (Art. II, R. 43), states that "it is understood" that the boundaries were as given therein.

In addition, each of the treaties contains a concession by a Division of the Shoshone Nation that the boundaries so specified are "defined and described by them", obviously to remove any possible future suggestion that they had not assented to the definition. "It is understood" means that both the United States and the Indians understood. "Understood" means that there was mutuality and a meeting of minds. The United States intended that the territory so defined should be the home of the Indians; for the very purpose of the Treaty was—as the instructions state—to establish boundaries "within which they will confine themselves" (R. 34). Apart also from the terms of the instrument it must be apparent that the very character of the transaction amounted to recognition of Indian title. Why enter into a treaty with them except upon the hypothesis that they had title? This result should follow even if there had been no assertion of title in the treaty. The view of the Court in parts of its opinion is that Indian title must be "formally acknowledged" (pp. 2-3) or "clearly and definitely expressed" in the treaty documents (p. 10). (The Court's statement at page 4 that the decisive recognition may be supplied "by implication" is not followed in the other portions of the opinion.) Thereby—although it is conceded that the rule of construction respecting Indian treaties is "that the language should be construed in accordance with the tenor of the treaty" (p. 14)—the Court now treats the

essential question as one of conveyancing. The Court below seemed to think it sufficient that "the treaty commissioners on behalf of the United States" did not intend or agree to acknowledge Indian title (R. 55-56). Either position departs from the recognized rule with reference to Indian treaties.

This Court for more than a hundred years, and in recent years, has recognized that the rule of construction for Indian treaties is as follows:

> "How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction." (*Worcester* v. *Georgia*, 6 Pet. 515, 582.)
>
> "The treaty must * * * be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." (*Jones* v. *Meehan*, 175 U. S. 1, 11.)
>
> "Treaties made with [Indians] are not to be interpreted narrowly, as sometimes may be writings expressed in words of art employed by conveyancers, but are to be construed in the sense in which naturally the Indians would understand them." (*United States* v. *Shoshone Tribe*, 304 U. S. 111, 116.)
>
> "It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." (*Tulee* v. *Washington*, 315 U. S. 681, 684-685.)

This is the rule which this Court has heretofore consistently applied to Indian treaties. It has been applied in this case by neither this Court nor the court below; for it is not to be supposed that the Shoshones could have understood that the United States was merely making a truce with them until—freed from the demands of the then raging civil war—it could dispossess them with immunity.

Nor is it a reasonable assumption that even so primitive a people would, if they so understood, assent to any such proposition.

The opinion of this Court resolves every doubt in favor of the United States. The Court thus states that whether "the issue as to acknowledgment by a treaty of Indian title to land, is treated as a question of fact, * * * or as a matter of inference to be drawn by the trier of fact from the treaty and surrounding circumstances or as a conclusion of law to be reviewed by this Court upon the record, this finding place the burden on petitioners to overthrow the judgment of the Court of Claims" (p. 8-9). If, as this Court has consistently held, the interpretation of a treaty is a question of law (*Jones* v. *Meehan*, 175 U. S. 1, 32 and cases cited; *Utah & N. R. Co.* v. *Fisher*, 116 U. S. 28, 32-3), then the only burden on plaintiff is the burden of going forward with the case; the interpretation of the treaty must be made by this Court without imposing a penalty or burden on either side, and in making such interpretation it had always been understood until now, that any doubts were to be construed in favor of the illiterate and dependent Indians.

IV. *The Result Reached by the Decision Convicts the United States of Sharp Practice With Its Wards and of Paying Tribute for the Protection of Its Citizens.*

It is callous cynicism to assume that the United States entered a solemn treaty with the Shoshone Indians for the sole purpose and with the single effect of buying peace. That was the view of the court below (R. 56), which this Court paraphrases as a finding that "the United States * * * sought only freedom from hostile acts from roving bands by the commitments for supplies. The treaties were made in the midst of civil war and before the outcome of that conflict was clear" (p. 10). Such a view assumes that instead of entering into the treaty for the legitimate pur-

pose of obtaining concessions from the rightful American owners of the soil, that we were so helpless that we had to pay tribute to an Indian tribe for the protection of our citizens—a throwback to the disgraceful episode in our history when near the end of the eighteenth century we along with the leading European nations paid tribute to the Barbary pirates.[5]

There is not one thing in the history of the Shoshone tribe or the circumstances surrounding the Box Elder Treaty that even suggests that the consideration to be paid under the treaty was a price or bribe for peace. Unlike the Barbary Pirates who made repeated demands on us for ransom, the Shoshones were a peaceful nation and had never waged war against us (R. 28). On the other hand the history of the few months preceding the treaty shows that General O'Connor could easily exterminate the entire Shoshone Nation, if it were necessary to protect our citi-

[5] DICTIONARY OF AMERICAN HISTORY, Vol. 5, pp. 324, 325 (published by Scribners in 1940; James Truslow Adams, Editor-in Chief).

It was this episode which at a dinner given to John Marshall upon his return from France in 1798 brought forth the toast, "Millions for defense but not a cent for tribute". The Home BOOK OF QUOTATIONS, Burton E. Stevenson, New York, 1944, p. 63.

The payment of this disgraceful tribute, which the United States led all other nations in abolishing (Larned, HISTORY FOR READY REFERENCE AND RESEARCH, published by the Nichols Publishing Co., Springfield, Mass., 1922) was opposed by Washington from the beginning. In a letter to Lafayette, dated March 25, 1787, he said:

"• • • Chastisement would be more honorable, and much to be preferred to the purchased friendship of the barbarians. By many • • • it has ever been considered as reflecting the highest disgrace on them (European nations) to become tributary to such banditti, who might for half the sum that is paid them be exterminated from the earth." WRITINGS OF WASHINGTON, edition published by the George Washington Bicentennial Commission, G. P. O., 1938, Vol. 29, p. 185.

Jefferson in a letter, dated May 13, 1791, to Thomas Barclay, United States Representative to Morocco, instructed him that we would "prefer war in all cases, to tribute under any form and to any people whatever". JEFFERSON'S WORKS, Definitive Edition, published in 1905 by the Jefferson Memorial Association, Vol. 8, p. 200.

zens (R. 35). In view of these facts we respectfully urge that the Court withdraw its opinion ascribing unto the Administration of Abraham Lincoln the sinister purpose of paying tribute to an Indian tribe for the protection of our citizens. Counsel have been unable in their research to find one other example in the history of this Court where this Court so construed a treaty as to convict this Nation of paying such a tribute.

The contrary interpretation is not only more generous to our Civil War President and our history as a nation but squares with the facts.

The declaration of "friendly and amicable relations" and "a firm and perpetual peace" is merely the preamble (Art. I, R. 43; Art. I, R. 40). The United States took an easement for safe routes of travel and lines of communication (Art. II, R. 40; Art. III, R. 40-41), declared that it "understood the boundaries of the Shoshone country" (Art. IV, R. 41; Art. IV, R. 44), committed itself to compensate them for the harm done (Art. V, R. 41), and granted annuities not for the purchase of peace, but for the recited consideration of "loss of game" "and the rights and privileges * * * conceded" by the Indians (Arts. V and VI, R. 41, 42; Art. III, R. 43-44).

To assume that the United States did nothing more than attempt to use the treaty form to secure a crude declaration of peace on the frontier is to ignore the whole policy of Indian settlement upon land, deprecate the solemnity of treaties, and deny the responsibilities of the guardianship the Nation had assumed. In view of all that had gone before the execution of this Treaty as well as its express terms and objects, so empty a treaty evidences trickery upon a helpless, dependent, and friendly people rather than brotherhood, neighborliness, or responsible decency, a construction in which this Court should never indulge.

Addendum to Brief

Since the preceding briefs were sent to the printer, the opinion of the Court of Claims in *Alcea Band of Tillamooks, et al.* v. *United States*, decided April 2,, 1945 has become available. In that case the Court of Claims, contrary to the dictum in the present case that "extinguishment of Indian title by" the United States "has proceeded, as a political matter, without any admitted legal responsibility in the sovereign to compensate the Indian for his loss", actually holds the United States liable for the taking of bare Indian title. Furthermore, the Court goes on to say:

> "If, in a suit by Indians against the United States pursuant to a special jurisdictional act, evidence of direct recognition by the United States that the Indians had property rights or a beneficial ownership in lands based on original Indian title through exclusive possession and occupancy of such lands were necessary, it would be sufficient in the case at bar to point to the act of August 14, 1848, 9 Stat. 323, which made all land laws of the United States applicable to the Territory of Oregon thereby created and in section 1 stated that nothing therein contained 'shall be construed to impair the rights of person or property pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, * * *" Further, in an opinion on the question of original Indian title to lands and the right of settlement thereon as public lands, the Attorney General on June 5, 1855 (7 Op. Atty. Gen. 293, 299), stated and held that 'There is one other idea suggested by the Commissioner of Indian Affairs, and the documents he communicates, as being current in Oregon, namely, that any white settler may rightfully take possession of any of the lands occupied by the Indians, and oust them prior to the extinguishment of their occupancy-title by the United States. This idea is too absurd to admit of reasoned reply. Suffice it to say that a White settler

has the same right thus to oust the Indians as he has to oust white men, and no more; that is, the right to substitute robbery for purchase, and in violence for law.' "

The reservation added by the Senate as Article V of the Box Elder Treaty in the case at bar establishes greater rights in the Indians—since it is by direct agreement with them—than does the implication from the reservation in the statute above quoted in the *Alcea* case that nothing contained therein was to "be construed to impair the rights of person or property pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians." In the *Alcea* case the statute was addressed only to white citizens, but implied that the United States recognizes and accords to the Indians their ancestral rights. *A fortiori*, when the United States by direct undertaking in a treaty with the Indians themselves provides that their rights shall be no greater than they had been at an earlier time, the United States must be held to have acknowledged the title to as much as they possessed at the earlier time. If the decision in the *Alcea* case be correct—as we think it is—the judgment of the Court in the present case is wrong.

Conclusion

Justice to the Indian tribes, the administration of Indian affairs, and the maintenance of a sound legislative policy respecting tribal claims all require that an opinion so sweeping as the instant one be thoroughly briefed and argued upon all points relied upon by the Court for its judgment. That presentation can only be secured upon rehearing, since the concurring opinion raises issues upon which the parties have not been heard and the principal opinion—in reversing the time-honored rule of construction of Indian treaties—should be reconsidered for the reasons stated herein. The majority of the Court holds, in effect, that in negotiating the Treaty in 1863 the Indians should have anticipated the legal niceties of this lawsuit, which assumes a rule of construction so at variance with the past as to require reconsideration.

Respectfully submitted,

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Of Counsel.

Certificate

The foregoing petition for rehearing is filed in good faith for the reasons therein set forth, and not for the purpose of delay.

ERNEST L. WILKINSON,
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